IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 24, 2007

STATE OF TENNESSEE v. EDWARD BUCK FRANKLIN

Appeal from the Circuit Court for Bedford County
No. 15,981 15,986 Lee Russell, Judge

No. M2006-01506-CCA-R3-CD - Filed September 4, 2007

Appellant, Edward Buck Franklin, pled guilty to two counts of failing to report in person as a sex offender, a violation of T.C.A. § 40-39-204. He was sentenced as a Range II multiple offender to three years for each offense. The trial court ordered the sentences to run consecutively, for a total effective sentence of six years. Appellant argues on appeal that the trial court erred by denying him a community corrections sentence. Because the record demonstrates that Appellant is not a suitable candidate for community corrections pursuant to T.C.A. § 40-36-106(a)(1), and because the record fails to demonstrate he is eligible for special needs placement pursuant to T.C.A. § 40-36-106(c), we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, Edward Buck Franklin.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Mike McCown, District Attorney General and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In February of 2006, Appellant was indicted by the Bedford County Grand jury for two counts of violation of the sex offender registration act for failing to report in person for the purpose of updating the registry. *See* T.C.A. § 40-39-204. Subsequently, Appellant pled guilty to the charges on April 21, 2006.

At the plea acceptance hearing, the prosecutor stated the factual basis for the charges as follows:

> The factual basis is that the defendant is designated a violent sex offender by virtue of convictions out of Sumner County from, I believe, 2000, and he was on the sex offender registry. He had, apparently, the last time he had registered was March 1st of 2005. The police department in running a routine check of compliance [for] sex offenders in November of 2005 determined that he had not registered since March. Being a violent sex offender, he is supposed to register quarterly, which meant that he missed the June reporting period and the September reporting periods. So that's the basis for the two-count indictment.

The trial court accepted Appellant's guilty plea to the two-count indictment. As part of the plea agreement, Appellant agreed to allow the trial court to determine the length and manner of service of the sentence at a sentencing hearing.

At the sentencing hearing, Appellant testified that he was a forty-nine-year-old male and had been living with his brother in Bedford County since November of 2001. Appellant stated that he moved in with his brother after his release from a sentence for two attempted rape convictions in Sumner County. At the time Appellant moved in with his brother, he registered with local law enforcement as a sex offender.

Sometime later, Appellant testified that he started "drinking again," and his brother's wife asked him to move out of the house. When Appellant moved out of his brother's house, he "got back on drugs." Appellant admitted to using about "a gram [of crack] a day" and spending approximately $50 a day on drugs.

Appellant promised that despite his past indiscretions, he would "register" and "pay [his] fee again like [he] did last year" and that he would not use drugs again. Appellant admitted that he needed help with his drug and alcohol problem and informed the court that he was about $25,000 behind on child support payments.

The State relied on the pre-sentence report at the sentencing hearing. It revealed that Appellant had three prior convictions for resisting arrest, one conviction for theft up to $500, two convictions for attempted rape, one conviction for aggravated burglary, one conviction for false imprisonment, one conviction for evading arrest, a retired conviction for assault, a retired conviction for possession of a weapon, one conviction for public intoxication, two convictions for driving under the influence, one conviction for driving with a revoked license, one conviction for petit larceny, and one conviction for forgery. The presentence report contained the following comments in regards to Appellant's two convictions for attempted rape:

> [Appellant] was sentenced to 6 years probation. His probation file states that he was sent to alcohol and drug treatment and placed in a halfway house following

> completion. [Appellant] left the halfway house two weeks later and absconded from probation. He was revoked and reinstated to probation and placed back in the halfway house. [Appellant] was terminated from the halfway house for being uncooperative with staff, harassing female participants in AA meetings and continued substance abuse. His probation was revoked in full on August 27, 2001 . . . .

After hearing the testimony of Appellant and reviewing the pre-sentence report, the trial court sentenced Appellant to three years for each violation of the sex offender registry, ordering that the two three-year sentences be served consecutively. The trial court later made the following findings with regard to alternative sentencing:

> The next issue is whether he's appropriate for alternative sentencing, and one of the major factors to be considered there is whether or not - - and there's a presumption in favor of alternative sentencing. The question is how likely is he to repeat? What is his potential or lack of potential for rehabilitation, including a risk of committing another crime while own [sic] probation? Well, number one, he has been revoked on multiple occasions in the past when on probation. Number two, he has a criminal record that's lasted over a very long period of time, from '83 forward through 2000 - - well through the present. And for that reason, I believe he is a high risk to repeat, so I'm not going to grant alternative sentencing.

After the denial of alternative sentencing, Appellant filed a timely notice of appeal. Appellant asks this Court to find that the trial court erred by denying him a community corrections sentence.

Alternative Sentencing

In regards to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary."

T.C.A. § 40-35-102(6)(2006).[1] A trial court should consider, but is not bound by, this advisory sentencing guideline." *Id.* Furthermore, a defendant sentenced to ten years or less "shall be eligible for probation" unless convicted of certain enumerated crimes. T.C.A. § 40-35-303(a).

In determining a defendant's suitability for a non-incarcerative sentencing alternative, the court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. T.C.A. § 40-35-103(5).

Community Corrections

The Community Corrections Act was meant to provide an alternative means of punishment for "selected, nonviolent felony offenders . . . , thereby reserving secure confinement facilities for violent felony offenders." T.C.A. § 40-36-103(1); *see also State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). Pursuant to statute, offenders who satisfy the following minimum criteria are eligible for participation in a community corrections program:

> (A) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (B) Persons who are convicted of property-related, or drug- or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
>
> (C) Persons who are convicted of nonviolent felony offenses;
>
> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

[1] The 2005 amendment removed the language that provided that the described offenders were presumptively eligible for alternative sentencing in the absence of evidence to the contrary and made the guidelines "advisory" in nature.

(E) Persons who do not demonstrate a present or past pattern of behavior indicating violence; [and]

(F) Persons who do not demonstrate a pattern of committing violent offenses[.]

T.C.A. § 40-36-106(a). However, persons who are sentenced to incarceration or who are on escape at the time of consideration will not be eligible, even if they meet these criteria. *Id.*

In the instant case Appellant has a lengthy history of criminal behavior that has remained undeterred despite numerous probationary sentences. This alone makes him an unsuitable candidate for any alternative sentence to incarceration. *See* T.C.A. § 40-35-103(1)(A) to (C). Moreover, his convictions for attempted rape and resisting arrest demonstrate he has repeatedly committed some violent offenses, thereby making him ineligible for community corrections under T.C.A. § 40-36-106(a) (E) and (F).

However, felons not otherwise eligible under the criteria of subsection (a) are eligible under subsection (c) of T.C.A. § 40-36-106 if they are unfit for probation due to a history of chronic alcohol or drug abuse, or mental health problems, but their special needs are better treatable in a community corrections program than in incarceration. An offender must also be eligible for probation in order to qualify for a community corrections sentence under subsection (c). *State v. Staten*, 787 S.W.2d 934, 936 (Tenn. Crim. App. 1989).

We are also of the opinion that Appellant, despite his apparent alcohol and drug abuse, is not a suitable candidate for a community corrections sentence under T.C.A. § 40-36-106(c). At the time Appellant committed his offenses, and at the time he was sentenced, the sex offender registration act provided that an offender was not eligible for full probation until he or she had served the minimum sentence for the offense. T.C.A. § 40-39-208(b). The first conviction for violating the act carries a minimum sentence of not less than ninety (90) days imprisonment and a $350 fine. The minimum sentence for the second conviction is one hundred eighty (180) days of confinement and a $600 fine. Since he was not immediately eligible for probation it is arguable that the holding in *Staten* would foreclose community corrections eligibility.[2] We need not decide that issue at this time however, because although Appellant demonstrated he abuses alcohol and drugs, there is no showing in the record that his abuses are treatable or that any treatment could be best served in the community rather than in a correctional institution. The last two items of proof must appear of record in order for a defendant to qualify for a community corrections placement under subsection (c) of T.C.A. § 40-36-106. *State v. Boston*, 938 S.W.2d 435, 439 (Tenn. Crim. App. 1996). With no such showing, we must affirm the decision of the trial court to deny a placement under subsection (c) of T.C.A. § 40-36-106.

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[2]Even if *Staten* is not directly applicable to this situation, since Appellant's sentences were consecutive to one another he would not be eligible for probation and thus community corrections under T.C.A. § 40-36-106(c) until he was imprisoned for 270 days. In this case it is doubtful he could even be considered for subsection (c) placement since his sentence was to the state penitentiary rather than the county jail and the trial court would lose jurisdiction over the sentence unless Appellant were awaiting transfer to the Department of Correction. *See* T.C.A. § 40-35-212 (c) & (d)(1).

Conclusion

In light of the foregoing the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE